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February 1, 2019

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Pend Oreille County Planning Commission
P.O. Box 5066
Newport, Washington 99156

RE: Planning Commission Meeting on January 8, 2019.

Dear Planning Commissioners:

This letter is sent on behalf of our clients, Responsible Growth NE Washington, in regard to the proposed comprehensive plan amendment, CPU-18-POC.

During the public comment portion of the Planning Commission meeting at the Cusick Community Center on January 8, 2019, the Chair restrained some members of the public from using the word “smelter.” During the course of the meeting, the Chair allowed citizens to testify regarding future use of property impacted by CPU-18-POC, particularly residential uses. The Chair also allowed at least two citizens to testify regarding future use of impacted property as a smelter. However, the Chair seemingly arbitrarily and with no explanation declared that testimony using the term “smelter” was prohibited.

This restraint inappropriately and unlawfully interfered with citizens’ state and federal public participation rights. The Chair’s restraint (*i.e.*, forbidding individuals from saying “smelter”) not only violated the Growth Management Act (“GMA”) and the State Environmental Policy Act (“SEPA”), but it also violated the First Amendment of the United States Constitution.

1. First Amendment of the United States Constitution

The restraint in the use of the term “smelter” at the January 8, 2019, meeting constituted a violation of the meeting participants First Amendment rights.

The Cusick Community Center constituted a designated public forum when the Planning Commission held its meeting. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Generally, a designated public forum is government property that has been opened for speech-related activities on a permanent or temporary basis. *See id.*; *United Food & Commercial Workers Local 1099*

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v. City of Sidney, 364 F.3d 738, 746 (6th Cir. 2004). When the government intentionally opens a place for speech-related activities, such as the Cusick Community Center, then the government may not exclude speech without justifying the exclusion with a compelling government interest. *See Cornelius*, 473 U.S. at 800. Government officials may not restrict speech simply because the officials oppose the speaker's view. *See id.* This constitutes an unconstitutional restraint on a citizens' right to free speech. *Id.* A government official may restrict speech in a content neutral manner in a designated public forum if it is a reasonable time, place, and manner restriction. *See Cornelius*, 473 U.S. at 800. A restriction based on the content of the speech, however, must be narrowly tailored to serve a compelling government interest. *Id.* This is an exceedingly hard standard to meet. *Id.*

Here, the Planning Commission chose to hold the public comment portion of the January 8, 2019, Planning Commission meeting at Cusick Community Center. Put differently, the Cusick Community Center was held open to the public for speech-related activities. Thus, the Cusick Community Center was a designated public forum during the public comment portion of the Planning Commission meeting. Accordingly, any restriction on speech in this designated public forum must be narrowly tailored to serve a compelling government interest.

The Planning Commission also opened comment that included future land use that could occur as a result of the passage of CPU-18-POC, including residential uses and allowed at least two people to testify regarding the smelter. This leads to the inescapable conclusion that the Chair was silencing certain members because of their viewpoint on the topic of smelters. This is not a content neutral restriction on speech. Considering that some members of the public were allowed regarding residential use and others to use the word "smelter," it is reasonable to conclude the chair was silencing certain members of the public because of their viewpoints of the content of the speech. Thus, the Chair's restraint on certain individuals from speaking the word "smelter" at the Planning Commission meeting violated the United States Constitution.

2. Growth Management Act

The Chair's restraint on speaking the word "smelter" at the Planning Commission meeting also violated the Growth Management. Washington adopted the GMA "to guide the development and adoption of comprehensive plans and development regulations of . . . counties and cities . . ." RCW § 36.70A.020. The Washington Legislature enacted the GMA to "[e]ncourage the involvement of citizens in the planning process and [to] ensure coordination between communities and jurisdictions to reconcile conflicts." *Id.* Indeed, the GMA aims to encourage "property owners and other affected and interested individuals[]" to participate in planning meetings in a meaningful manner. RCW § 36.70A.035.

At the January 8, 2019, Planning Commission meeting, the Chair explicitly forbid some individuals in attendance from saying the word "smelter." This is significant because the construction of a smelter is a matter of significant public concern—especially to property owners, community members, and other interested individuals that may be directly impacted by this construction. *See id.; see, e.g.,* Becky Kramer, *Northeast Washington Silicon Smelter Plans Raise Concerns*, SPOKESMAN-REVIEW, Nov. 1, 2017; Becky Kramer, *Company Prepares to Move on Newport Smelter's Environmental Study*, SPOKESMAN-REVIEW, June 21, 2018; Samantha Wohlfeil, *A Proposed Silicon Smelter in Northeast Washington has Neighbors Worried About Pollution and Health*, INLANDER, Apr. 26, 2018. The Chair's misguided attempt to stifle public participation at the Planning Commission meeting violated the letter

and spirit of the GMA. Put simply, the Chair discouraged public participation and ensured further discord between the community and the Commission.

3. State Environmental Policy Act

The Chair's restraint on speaking the word "smelter" at the Planning Commission meeting also violated the State Environmental Policy Act. To minimize the adverse environmental effect of certain actions, SEPA provides a process that must be followed to ensure that all actions are carefully considered and potential impacts identified prior to the implementation of the action. RCW § 43.21C.010. All local and state decisions that meet the definition of an "action" are subject to the mandates of SEPA. WAC § 197-11-704. SEPA, like the GMA, also has a public participation requirement. WAC § 197-11-535. Under SEPA, if a public hearing on a proposal is held "under some other requirement of law," then "such hearing *shall be open to consideration of the environmental impact of the proposal, together with any environmental document that is available.*" WAC § 197-11-535 (emphasis added).

Here, the January 8, 2019, Planning Commission meeting was subject to the mandates of SEPA because CPU-18-POC is subject to SEPA review. Accordingly, the Planning Commission meeting must "be open to consideration of the environmental impact of the proposal . . ." Put differently, the Planning Commission meeting was required to be "open to consideration of the environmental impact" that the proposed smelter may have on the community. WAC § 197-11-535. Therefore, by restraining the public from mentioning the word "smelter," the Chair effectively refused to consider the potential environmental impacts that the proposed smelter may have on the community. Thus, the Chair violated SEPA.

4. Conclusion

In sum, the Chair violated the First Amendment of the United States Constitution, GMA, and SEPA by restraining certain members of the public from speaking the word "smelter" during the public comment portion of the Planning Commission meeting on January 8, 2019, held at the Cusick Community Center. Accordingly, we request that the Planning Commission remedy this error by conducting another open record hearing to allow public testimony of CPU-18-POC with clear direction to the public that testimony about potential future use of impacted properties is allowed.

Sincerely,

UNIVERSITY LEGAL ASSISTANCE



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cc: Greg Snow, Community Development Director
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